United States Court of Appeals

NINTH CIRCUIT.

No. 13079

CIVIL.

RAY P. KOENIG,

Appellant,

vs.

DONALD CORCORAN,

Appellee.

Appeal from the United States District Court
for the District of Montana,
Helena Division.

APPELLANT'S BRIEF

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AUTHORITIES CITED

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APPELLANT'S BRIEF

This is an appeal from a judgment and an Order of the Court sustaining motion to dismiss (R. 11).

Jurisdiction is invoked by virtue of diversity of citizenship as set out in the complaint (R. 3).

The complaint and answer thereto (R. 3-8, inclusive).

This is an action for damages for alienation of affections and it is claimed by the plaintiff that over a period beginning in November, 1947, and covering up to the time when a divorce was granted to plaintiff's wife, and covering further the fact that subsequent to the divorce, the defendant married plaintiff's former wife.

SUMMARIZATION AND STATEMENT

The defendant was called as a witness and testified that he met plaintiff's wife at the Duchess, a tavern about one mile west of Bemidji, Minnesota, late in No-

vember of 1947, when and where she was formally introduced to him by Elicia Utter (R. 15). Therafter, he repeatedly saw her and kept company with her.

The witness Strowbridge testified that he saw the defendant and plaintiff's then wife together in the fall of 1947 and that he first saw them together about November 11, 1947 (R. 20-21). Some weeks he would see them together two or three times and some weeks not at all (R. 22-23).

The witness Hiltz testified that he saw the defendant in the company of Mrs. Koenig at the tavern — the Duchess—during the fall of 1947; that they were together and having beer together (R. 34). In January and February, 1948, he saw defendant and Mrs. Koenig together in the tavern, or in the yard, and also saw them together in defendant's automobile (R. 35).

The witness Suckert testified that in the latter part of February, 1948, he saw defendant and Mrs. Koenig together in defendant's automobile parked in the yard near the tavern (R. 41-42) and saw this happen frequently (R. 42). Quite a few times after the closing of the tavern, he would go from the tavern to town and get something to eat and would return at around three or four o'clock in the morning and Mrs. Koenig and the defendant would be in the automobile together in the vicinity of the tavern (R. 42).

That in February or March of 1948, he saw defendant and Mrs. Koenig lying on the bed together in the residence near the tavern; that it was after closing time of the tavern where he worked, and closing time was about one o'clock a.m. (R. 43); that they were on the bed that he usually slept in downstairs; that no one was at the home, and when he came in, defendant and Mrs. Koenig were the only people in the residence;

that he asked them what they were doing (R. 43) and was told: "to go up stairs and sleep" (R. 43).

Plaintiff testified that he was Service Manager for W. W. Wallwork in Fargo, and that this was the largest Ford Dealer in the northwest with offices in Fargo, North Dakota, and Moorhead, Minnesota.

Much of the testimony of plaintiff in chief is left out of the printed record in order to save as much expense as possible but enough is in the record to enable this Court to pass on the legal questions involved.

During the period from July, 1947, down to November, 1947, plaintiff was staying and working at Brainerd, Minnesota, and his wife was visiting and staying with her sister at Bemidji, Minnesota, and they were alternating on week ends, he visiting her one week end and she visiting him the next week end (R. 45-46). During all of this time, he was supporting his wife (R. 46); that the latter part of November, 1947, his wife became noticeably cool toward him (R. 47-48); that on Christmas Eve, he took gifts to his wife and her relatives and his boy and went to the home of his wife's sister for Christmas and Christmas Eve, and after the gifts were given by all parties, she told him that she no longer loved him. The wife was granted a divorce from him in May, 1948 (R. 49), and he learned for the first time after the divorce of his wife's relation with defendant; prior to the divorce he had never to his knowledge seen defendant (R. 50). His former wife married the defendant after the divorce was granted and is his wife now (R. 50). For five years immediately preceding the trial, he has had ten days off from work (R. 46).

POINTS

I.

Under the evidence, the case presented is and was one for submission to a jury.

II.

The Court erred in sustaining defendant's motion for dismissal and ordering dismissal of the action pursuant to said motion.

ARGUMENT

Points I and II will be considered together.

A motion for directed verdict or dismissal tests the legal sufficiency of the evidence and is a quasi admission of the truth of the evidence. It admits the facts stated in the evidence adduced, and it admits as true every fact which the evidence tends to prove and any favorable conclusion in behalf of the adverse party that a jury might fairly and reasonably infer from the testimony. Thus, the defendant by a motion for a directed verdict or dismissal on the evidence introduced by the plaintiff, admits not only the testimony to be true, but also every conclusion which a jury might fairly or reasonably infer therefrom insofar as the ruling on the motion is concerned.

53 Am. Jur., Sec. 340, p. 273;

State v. Quism, 111 S. Car. 174, 97 S. E. 62, 3 A. L. R. 1500;

Smith v. Berdine's Inc., 144 Fla. 500, 198 So. 223, 138 A. L. R. 115;

Exchange State Bank v. Occident Elevator Co., 95 Mont. 78, 24 Pac. (2d) 126, 90 A. L. R. 740;

Long v. Davis, 68 Mont. 85, 217 Pac. 667;

Anderson v. Border, 75 Mont. 516, 244 Pac. 494.

The Trial Court should not assume to direct a verdict when its ruling would require it to pass upon the credibility of witnesses and weigh testimony or would require it to resolve conflicts in the evidence.

53 Am. Jur., Sec. 362, p. 292.

Assuming that we are sound in the foregoing, and we think we are, without conflict in the law, what is the force, effect and strength of the evidence in this case when met by a motion for dismissal?

The evidence shows without contradiction that defendant met Mrs. Koenig, plaintiff's former wife and defendant's present wife, in the early part of November, 1947; that she was formally introduced to him (R. 15). This is an established fact. From this we must infer that she was introduced as Mrs. Koenig, and that defendant knew she was married. Certainly, upon the issue of whether or not he knew she was married, there was evidence upon which this issue should have been submitted to the jury regardless of the fact that he subsequently in his testimony said he did not know she was married until the latter part of February, 1948. This is especially true when we have a witness with interest in the result of an action, the party defendant.

53 Am. Jur., Sec. 367, p. 297.

The testimony of an interested witness does not conclusively establish the facts testified to although there is no evidence directly contradictory thereto, since the credibility of the testimony of such witness presents a question of fact for the jury.

Sonnenthiel v. Christian Moerlein Brewing Co., 172 U. S. 401, 43 L. Ed. 492;

Repport v. White Star Lines, 328 Pac. 346, 106 A. L. R. 413;

Volkman v. Manhattan Ry. Co., 134 N. Y. 418, 31 N. E. 870, 70 A. L. R. 34.

Now, viewing the testimony in the light most favorable to plaintiff, we have the defendant meeting Mrs. Koenig the early part of November, 1947, and find him seeing her three or four times a week during the fall, at least some weeks, and the evidence warrants the inference that this carried on continuously up to the time when he was seen at one o'clock in the morning in bed with Mrs. Koenig in a residence all alone and one mile from town; and when seen by the person whose bed they were using, such person was told by the defendant and Mrs. Koenig to go on upstairs and "go to sleep". This is positive testimony as to which there is no contradiction.

That there was a divorce in May, 1948, is not in dispute. That this defendant after this divorce married Mrs. Koenig, is not in dispute.

This divorce and subsequent marriage when taken in connection with all that happened from November up until the divorce and subsequent marriage is not only evidence that makes out a prima facie case, but is evidence that might be termed as conclusive against the defendant under the charge of having alienated the affections of plaintiff's wife.

We may be subject to the charge of not having put in all of the evidence that the Court would like to see with regard to the testimony of the plaintiff, but we feel that in support of authorities relied upon, the evidence is overwhelming and this deletion is done in order to save expense to the plaintiff.

A careful reading of the cross examination of the plaintiff (R. 50 to 77, inclusive) will show this to be

an attack by innuendo and insinuation with very little probative value on the issue involved in this appeal.

The Court in passing on the Motion for dismissal said that the fact that a man and woman were lying on a bed together at one o'clock in the morning with no one in the house but them, one mile from town and nobody around would not give the jury a right to infer that there was any immorality contemplated or indulged (R. 84-85). The Court to have reached such a conclusion must have been superlatively pure minded. The rule applicable deals with the ordinary man in the exercise of ordinary common sense under all the circumstances and not with what a superlatively pure minded person would think.

> "WHEN AN INFERENCE ARISES. An inference must be founded:
>
> 1. On a fact legally proved; and
> 2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature. Title 93, Sec. 1301-4. Revised Codes of Montana, 1947."

In *Hillers v. Taylor,* 108 Md. 148, 69 Atl. 715, Alienations of Affections, the following instruction embodies what, in our humble opinion, is the pertinent law:

> "You are further instructed that in order for the plaintiff to recover damages against the defendant, it is not necessary that the plaintiff should prove any one act of illicit intercourse, which is conclusive of guilt, but the jury must consider the opportunity for the commission of the act, the conduct of the parties, and all the circumstances, and then determine from the whole of the testimony whether it should convince unprejudiced and cautious persons of the guilt of the parties; and if upon a consideration of all the evidence in the case the jury

are satisfied of the commission of one act of illicit intercourse then their verdict should be for the plaintiff."

We respectfully submit that the evidence adduced by the plaintiff is overwhelming in its sufficiency for the presentation of this case to a jury and that the Court in sustaining the motion for dismissal and entering judgment of dismissal herein erred and that this case should be remanded for retrial subject to the directions of this Court in the Opinion which may be filed herein.

Dated: December 17, 1951.

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